Ngeow Yin Ngee v Majlis Peguam Malaysia

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R–17B–5 OF 2002
AZMEL MAAMOR, ZULKEFLI MAKINUDIN AND ZAINUN ALI JJ
29 DECEMBER 2003

Administrative Law — Rules of natural justice — Breach of — Disciplinary proceedings — Presence of vice president at disciplinary board meetings — Whether ultra vires r 4(1) of Legal Profession (Disciplinary Board) (Procedure) Rules 1994 — Whether decision to be set aside — Whether in breach of principles of natural justice

Legal Profession — Disciplinary proceedings — Disciplinary Board — Presence of vice president at meeting of disciplinary board — Whether ultra vires r 4(1) of Legal Profession (Disciplinary Board) (Procedure) Rules 1994 — Whether decision to be set aside

A complaint had been forwarded against the appellant in that he had placed himself in a position of conflict of interest when he acted as counsel in a land transaction. The complaint was later withdrawn. The disciplinary board ('DB') of the Bar Council ('BC') however, pursued the complaint by virtue of r 8(1) of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 ('the DC Rules'), but the investigating tribunal recommended that a formal inquiry was unnecessary. Dissatisfied, the DB appointed a disciplinary committee ('DC') to review the complaint and it too found the complaint was not substantiated. The DB however took disciplinary action against the appellant by ordering him to pay a fine. This was the appellant's appeal against the said decision.

Held, setting aside order of the disciplinary board:

(1) The facts proved that the vice president of the BC, as an 'alternate', was present at the meetings of the DB where the recommendations or findings of the IT and the DC were discussed and deliberated upon and where decisions were taken to reject such recommendations or findings, contravened r 4(1) of the Legal Profession (Disciplinary Board) (Procedure) Rules 1994 ('the DB rules') which prohibits or disqualifies the vice president from attending the said board meetings, and he was also in breach of the principles of natural justice (see paras 26 and 29).

(2) Based on the facts it would be difficult to accept that there had been no opportunity for members of the DB to be influenced in their judgment, even assuming that the vice president was merely present at the said meeting and did not take part in the deliberations. It would appear that justice may seem not to have been done (see para 30).

[**Bahasa Malaysia summary**

Suatu aduan telah dimajukan terhadap perayu dalam mana beliau dikatakan telah meletakkan dirinya dalam keadaan yang mempunyai kepentingan bercanggah apabila beliau bertindak sebagai peguam dalam satu transaksi hartanah. Aduan tersebut kemudiannya telah ditarik balik. Akan tetapi, lembaga tatatertib ('LT') Majlis Peguam ('MP') telah meneruskan siasatan terhadap

aduan tersebut melalui k 8 Kaedah-Kaedah Amalan Guaman (Prosiding Tatatertib) (Tribunal Siasatan dan Jawatankuasa Tatatertib) 1994 ('Kaedah JT'), namun tribunal siasatan ('TS') telah mengesyorkan bahawa suatu siasatan rasmi tidak diperlukan. Terkilan, LT telah melantik jawatankuasa tatatertib ('JT') untuk mengkaji aduan tersebut dan ia juga telah mendapati bahawa aduan tersebut tidak berasas. Namun begitu, LT telah mengambil tindakan tatatertib terhadap perayu dengan memerintahkannya untuk membayar saman. Ini adalah rayuan perayu terhadap keputusan tersebut.

Diputuskan, menepikan perintah lembaga tatatertib:

(1) Fakta membuktikan bahawa naib presiden MP turut hadir dalam perhimpunan LT di mana pendapat atau keputusan JT dan TS dibincangkan dan dipertimbangkan dan bilamana keputusan dibuat untuk menolak saranan, melanggar k 4(1) Amalan Guaman (Lembaga Tatatertib) (Prosedur) 1994 ('Kaedah LT') yang melarang atau tidak melayakkan naib presiden untuk menghadiri perhimpunan-perhimpunan lembaga yang berkenaan, dan beliau juga telah melanggar prinsip-prinsip keadilan asasi (lihat perenggan 26 dan 29).

(2) Berdasarkan fakta, adalah sukar untuk menerima bahawa tidak terdapat peluang untuk ahli-ahli LT terpengaruh dalam membuat keputusan, walaupun diandaikan bahawa naib presiden hanya hadir di perhimpunan tersebut dan tidak mengambil bahagian dalam pertimbangan berkenaan. Maka, timbullah anggapan bahawa keadilan tidak dilaksanakan (lihat perenggan 30).]

Notes

For cases on breach of rules of natural justice, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 712–722.

For cases on disciplinary proceedings, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1559–1560.

For breach of natural justice, see 9 *Halsbury's Laws of Malaysia* paras [160]092]–[160.109].

Cases referred to

Cooper v Wilson [1937] 2 KB 309 (folld)

Rohana Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487 (folld)

Legislation referred to

Legal Profession (Disciplinary Board) (Procedure) Rules 1994 r 4(1)

Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 r 8(1)

Legal Profession Act 1976 s 103E

Zainur Zakaria (Zainur Zakaria & Co) for the appellant.

Cheah Soo Chuan (Lee Hishammuddin) for the respondent.

Zulkefli J:

[1] This is an appeal by the appellant under the provision of s 103E of the Legal Profession Act 1976 ('the Act') against the decision of the Advocates and Solicitors Disciplinary Board ('DB') made on 8 February 2002 in rejecting or not agreeing with the findings of the Investigating Tribunal ('IT') dated 19 February 1999 and the Disciplinary Committee ('DC') dated 11 January 2002 set up under the provisions of the Act. The appellant has contended that the said decision of the DB dated 8 February 2002 is null and void as being in breach of the principles of natural justice and ultra vires and in contravention of the Legal Profession (Disciplinary Board) (Procedure) Rules 1994 ('The DB Rules').

BACKGROUND FACTS OF THE APPELLANT'S CASE

[2] The relevant background facts of the appellant's case are as follows.

[3] The original complaint was made by one Madam Yap Chun Moi ('the complainant') through her solicitors M/s Christy Soosay Nathan & Associates by a letter dated 8 September 1994 addressed to the DB.

[4] The complaint, inter alia, is focused on the issue that the appellant as counsel had placed himself in a position of conflict of interest when he acted as counsel in a land transaction dealings between the complainant and a company known as Matrix Development Construction Sdn Bhd ('the company') without disclosing his interest as a director and majority shareholder of the company to the complainant.

[5] The complainant by letter dated 14 April 1997 withdrew the complaint.

[6] Pursuant to r 8(1) of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 ('The DC Rules'), the Bar Council ('BC') took over the complaint on 18 September 1998.

[7] Pursuant to the BC taking over the complaint aforesaid, the IT investigated the complaint.

[8] After having completed its investigation the IT recommended to the DB that a formal investigation was not necessary.

[9] The DB not being satisfied with the recommendation of the IT decided to appoint a DC to inquire into the complaint.

[10] The DC did inquire into the complaint.

[11] The DC in the report dated 11 January 2001 found that the complaint had not been substantiated and did not make any recommendation to the DB against the appellant.

[12] The DB at its meeting held on 14 April 2001 disagreed with the conclusion of the DC and requested the appellant to appear and make representations why the appellant should not be found guilty of misconduct.

[13] When the matter next came up before the DB on the 23 November 2001, appellant's counsel requested for the grounds for the DB's disagreement with the DC. The DB agreed to provide the main grounds. A

[14] By formal notice dated 11 November 2001, the DB required the appellant to appear before the DB on 8 February 2002 to show cause.

[15] However, on the 10 January 2002, the appellant through his counsel, requested to know the date when the DB took the decision to disagree with the report of the DC and the names of the members of the DB who attended the meeting. The appellant's counsel also indicated that he would seek adjournment if the information sought was not provided in advance. B

[16] The DB by its letter dated 22 January 2002 answered the query as to the date the DB took the decision (ie 14 April 2001) and that the DB would proceed with the hearing on 8 February 2002 and take into account any representation the appellant would make before the DB made the appropriate order. C

[17] Counsel for the appellant sent a further letter dated 23 January 2002 requesting the names of the members who attended the meeting on 14 April 2001. This information was not provided. D

[18] The DB met on 8 February 2002. Both the appellant and his counsel attended. Counsel addressed the DB that he had not been supplied with the names as per his letter dated 23 January 2002 and the appellant did not 'recognize' the decision of 14 April 2001 'in principle' and requested the DB to defer the proceeding. The DB considered the request and refused to defer. The DB invited counsel to make any representations he wished as to why the DB should not reject the report of the DC and or make any appropriate order. E

[19] Counsel for the appellant declined and maintained that the appellant challenges the legality of the decision on 14 April 2001. Hence the appellant, counsel contended, cannot participate in the proceedings. Counsel also declined the DB's invitation to make his representations while reserving his position to challenge the legality of the decision of the DB elsewhere. Both counsel and the appellant then withdrew from the proceedings. F G

[20] The DB then went ahead with the hearing in the absence of the appellant and his counsel and consequently made a finding against the appellant and on 21 February 2002 made an order under s 103 of the Act. The appellant was ordered to pay a penalty of a sum of RM5,000.

[21] The reason why the appellant had requested for the names of the DB members who had attended the meeting which deliberated on the complaint against the appellant was because the appellant had strong reasons to believe that the chairman of the Bar Council or his alternate had sat in and deliberated at the meetings when the complaint against the appellant was being discussed. H

[22] The request by the appellant for the information though made as far back as 10 January 2002 was only fulfilled by the DB on 5 April 2002 after the DB had made the order against the appellant. I

[23] On going through the names of the board members who had sat in and deliberated at those meetings where the complaint against the appellant was discussed, the appellant discovered that the vice president of the Malaysian Bar and several members of the Malaysian Bar Council had been present at those meetings.

[24] It is the contention of the appellant that as the Malaysian Bar Council was the complainant, the presence of the vice president of the Malaysian Bar was not only ultra vires and in contravention of r 4(1) of the DB Rules but also clearly in breach of the principles of natural justice.

[25] It is further contended by the appellant that such breach was further compounded by the presence of other members of the Bar Council who as representatives of the Bar Council had an interest in the complaint against the appellant.

DECISION OF THE COURT

[26] I am of the view that the presence of the vice president of the Bar Council at the meetings of the DB where the recommendations or findings of the IT and the DC were discussed and deliberated upon and where decisions were taken to reject such recommendations or findings was clearly ultra vires r 4(1) of the DB Rules which clearly prohibits or disqualifies the vice president of the Bar Council from attending the said Board meetings. Rule 4(1) of the said DB Rules reads as follows:

> where the Bar is the complainant or where the Bar Council intervenes under r 8 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, the President of the Bar Council or his alternate, as then may be, shall be disqualified as a member of the Disciplinary Board for the purposes of the quorum.

[27] The learned counsel for the respondent amongst others in his submission contended that all that the law requires is that where the complainant is the Bar Council, the president of the Bar Council or his alternate, shall be disqualified but only for the purposes of the quorum. It was conceded by the respondent that the vice president was present at the said meetings of the DB on 28 August 1999, 14 April 2001 and 8 February 2002 but it was impressed upon the court that the vice president despite being present did not participate in the discussions and decision taken in respect of the complaint made against the appellant. For this reason, it was submitted for the respondent that after discounting the vice president of the Bar Council, there was still sufficient quorum for the meetings of the DB on 28 August 1999, 14 April 2001 and 8 February 2002. Thus the said meetings of the DB were said to be valid and in order.

[28] It is also the contention of the respondent that given the statutory scheme of the Act and the rules made thereunder, the common law requirements of natural justice do not apply to the appellant's case. For the respondent in the final analysis, where statute such as the Act lays down an elaborate code of procedure, the question for the court to decide is whether the procedure taken as a whole complies with the rules of natural justice.

[29] With respect, I could not agree with said contention of learned counsel of the respondent. To my mind, the intent and purport of the aforesaid r 4(1) of the DB rules is very clear and in the present case since the complaint was a complaint taken over by the Bar Council under r 8 of the DC Rules, the vice president of the Bar Council as the 'alternate', had clearly contravened r 4(1) of the DB rules and that his presence at those meetings of 28 August 1999, 14 February 2001 and 8 February 2002 was clearly in breach of the principles of nature justice, ie that 'no man shall be a judge in his own cause'. The case of *Rohana Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 may be cited as an authority for the above proposition wherein in this case his lordship Edgar Joseph Jr J (as he then was), inter alia, held that the proceedings before the disciplinary authority were contrary to natural justice owing to the presence of the registrar of the respondent university, the complainant in the case of both the applicants, during the disciplinary authority's deliberations. In this case it was also found that the registrar was very far from being a mere nominal complainant and had shown active participation in the proceedings before the disciplinary authority.

[30] Taking into consideration the facts and circumstances of the case as a whole, I am of the view it would be difficult to accept that there had been no opportunity for members of the DB to be influenced in their judgment, even assuming that the vice president was merely present at the said meeting and did not take part in the deliberations. It would appear that justice may seem not to have been done. On this point, I would like to refer to the case of *Cooper v Wilson* [1937] 2 KB 309 wherein his lordship Scott LJ at p 344 had this to say:

> It makes no difference whether he then discussed the case with them or not; the risks that a respondent may influence a court is so abhorrent to English notions of justice that the possibility of it or even the appearance of such possibility is sufficient to deprive a decision of all judicial force, and to render it a nullity.

[31] For the reasons above stated, the appeal is allowed with costs and the order of the DB under s 103 of the Act is hereby set aside.

[32] My learned brother Azmel J and my learned sister Zainun Ali J have read this judgment in draft and have expressed their agreement with it.

Appeal allowed with costs.

Reported by M Maheswaran